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No. 88-424

In the Supreme Court of the United States

OCTOBER TERM, 1988

EMERYVILLE TRUCKING, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supports the National Labor Relations Board's findings that petitioner was a joint employer of the drivers of trucks leased by it to another employer and that petitioner caused the layoff of those drivers in retaliation for the successful prosecution of a grievance by one of the drivers.

2. Whether the Board abused its discretion by accepting a settlement from the other joint employer and holding petitioner primarily liable for the consequences of its discriminatory actions.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 91a-95a) has not been reported. The first decision and order of the National Labor Relations Board (Pet. App. 38a-44a), including the decision of the administrative law judge (Pet. App. 45a-73a), is reported at 278 N.L.R.B. 1112. The Board's supplemental decision and order (Pet. App. 76a-90a) is reported at 285 N.L.R.B. No. 132.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1988. A rehearing petition was denied on June 9, 1988. The petition for a writ of certiorari was filed on September 7, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, which owns a fleet of tractor trailer trucks which it leases to common carriers in the freight hauling business, leased about 60 trucks to the Astro Division of Helms Express (Helms) for a period ending December 31, 1982. The leased trucks operated out of petitioner's Warrendale, Pennsylvania, terminal, and petitioner and Helms maintained an agreement under which petitioner acted as the exclusive agent for Helms in the solicitation of certain freight business. The drivers hired by Helms were union members whose terms and conditions of employment were fixed by the Teamsters' National Master Freight Agreement, to which Helms, but not petitioner, was a signatory. With respect to hiring drivers, petitioner had authority to place an applicant in a 30-day probationary status, while Helms retained the final employment decision. Drivers were paid by payroll checks written by Helms and distributed by petitioner. Helms processed grievances and, for the most part, paid them. Pet. App. 49a-52a.

In addition to its agency and lease agreements with Helms, petitioner had an agreement with U.S. Steel that, on a half day's notice, it would move whatever loads U.S. Steel needed moved. To accommodate that commitment to U.S. Steel, drivers of the leased trucks were required by petitioner, on pain of discharge, to call in for permission before taking on a new load, and were denied permission to take trips that would compromise petitioner's ability to respond to U.S. Steel upon short notice. In February 1981,[1] one such mandatory call-in resulted in petitioner's instruction to driver Melvin Packer, who was in Detroit, to turn down two loads (including a load offered by Helms' agent in Detroit) and to return empty to the Warrenville terminal. Packer did as instructed, but filed a

[1] All dates are in 1981 unless otherwise noted.

grievance under the Master Freight Agreement since his pay depended on transporting loads. Pet. App. 53a, 56a.

Packer's grievance had the potential to establish a precedent that would diminish petitioner's ability to respond promptly to U.S. Steel, and was therefore of considerable concern to petitioner's co-owners, Phillip and John Rezzetano (Pet. App. 53a-54a). In July, after attending the hearing on Packer's grievance, Phillip Rezzetano told Packer that "if I lose that grievance you're through * * * if I have to lay off half this fleet * * * to get to you" (*id.* at 54a-55a, 64a). Packer prevailed, and when he went to petitioner's office to pick up the check for his grievance award, Phillip Rezzetano told him that he was laying him off. When told that Packer was senior to many drivers, Rezzetano ordered cancellation of the truck leases with Helms of every truck whose driver was junior to Packer, resulting in notice to Helms of the cancellation of 31 truck leases. Petitioner notified the 30 drivers junior to Packer that they were laid off, told some of them that their truck leases had been canceled "to get to Mel Packer," and offered all of the affected drivers, except Packer, employment in Team Transport, a non-union company operated by petitioner. *Id.* at 55a, 65a.

On September 21, a driver who had not been laid off on September 14 was told by John Rezzetano that the lease on his truck was canceled, but that he could work for Team Transport. John Rezzetano said that they had planned to move all the drivers to Team Transport. He added that "[t]hey didn't want to do it at this time or this quickly, [but] because of the incidents leading up to this situation * * * they were forced to go over to Team a little sooner than anticipated." He explained that the incidents he referred to were "Mel Packer and Helms." Pet. App. 81a. At about the same time, Phillip Rezzetano told Philip Bateman, Team Transport's president, that petitioner's

difficulty involving Packer was one of the reasons he was breaking with Helms (*id.* at 80a).[2] On September 24, petitioner notified Helms that, as of September 30, it was canceling the leases on the remaining trucks and terminating the agency agreement (*id.* at 68a). Helms acknowledged petitioner's action, and notified the 31 affected drivers that they were on layoff status as of the cancellation date (*ibid.*).

2. On a charge filed by Packer, a complaint issued alleging that petitioner, as the joint employer with Helms of the laid off drivers, had violated the Act by causing the layoff of Packer and the other drivers in retaliation for Packer's grievance and other protected activity. The complaint also named Helms as a respondent and alleged discriminatory layoffs by it. After commencement of the hearing, the ALJ, over petitioner's objections, approved a settlement of the complaint against Helms making Helms secondarily liable for any backpay remedy for the period from September 14 to September 30, the effective date of petitioner's cancellation of the lease/agency arrangement (Pet. App. 39a n.2,46a n.1).

The Board, in agreement with the ALJ, found that petitioner was a joint employer with Helms of the drivers of the leased trucks, and that petitioner had violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), by discriminatorily causing the layoff of Packer in retaliation for protected activity, and by causing the layoff of the drivers junior to him in order to reach Packer (Pet. App. 38a-39a, 45a-46a). In disagree-

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[2] Friction had developed in petitioner's relationship with Helms, and it further deteriorated during the summer of 1981 (Pet. App. 61a). Among the problems were Helms' solicitation of freight in petitioner's territory and its unilateral withholding of a portion of petitioner's lease rentals (*ibid.*). In addition, petitioner had directed drivers of the leased trucks to refuse Helms' loads in order to service Team Transport (*id.* at 54a-57a).

ment with the ALJ, the Board further found that the second round of layoffs was the result of petitioner's earlier unlawful conduct, and also violated the Act (*id.* at 76a-83a).[3]

In finding petitioner to be a joint employer, the Board noted that "the question of 'joint employer' status is a factual one and requires an examination into whether an employer who is claimed to be a 'joint employer' possessed sufficient control over the work of the employees to qualify as a joint employer with [the actual employer]" (Pet. App. 47a (citations omitted)). The Board found that, while it appeared from the formal arrangements between petitioner and Helms that Helms alone was the drivers' employer, a "closer look at [petitioner's] role in the day-to-day operations shows that it in very substantial degree controlled how the drivers performed their jobs, to the point of laying them off or firing them if [its] own standards were not met" (*id.* at 52a). The Board concluded that "[t]his control over dispatch and discipline [is] sufficient to render [petitioner] a joint employer with Helms" (*ibid.*). It further concluded that "Helms was an absent employer" (*id.* at 57a), and that "for all practical purposes the drivers who were nominally employed by Helms reported to and drove for [petitioner] * * * which could and did 'meaningfully affect' significant matters relating to their employment" (*id.* at 59a).[4]

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[3] The Board's supplemental decision so finding (Pet. App. 76a-83a) was issued after reconsideration, sua sponte, of its earlier decision (*id.* at 38a-39a), which had affirmed the ALJ's conclusion that the second round of cancellations was the result of a separate business decision (*id.* at 38a-39a, 70a).

[4] The Board noted that Phillip Rezzetano had told a driver who questioned petitioner's instructions to do work for Team Transport in violation of a contrary directive from Helms that the leased trucks " 'were his trucks * * * and nobody would tell him how to operate his

The Board rejected petitioner's contention that the truck leases would have been canceled in any event, because of the deterioration in its relationship with Helms during the summer of 1981. The Board found that while petitioner "was being provoked by Helms * * * the truck leases were [not] cancelled on 14 September for that reason. The provocation that caused the cancellations came from Packer, who was perceived in Phill[ip] Rezzatano's eyes as a troublemaker" (Pet. App. 64a). In such circumstances, the Board said, "it matters not * * * whether [petitioner] had it in mind to cancel some leases with Helms to focus attention on its problems. What does matter is that [petitioner] cancelled the lease on Packer's truck and 30 others in order to rid itself of a union activist" (*id.* at 65a).

Finally, the Board found that the September 24 cancellation of the remaining truck leases as of September 30 was a result of petitioner's prior unlawful actions and accordingly was unlawful, notwithstanding the absence of any evidence of specific discriminatory motivation for the second round of cancellations (Pet. App. 78a, 82a & n.9). The Board explained that, "while [petitioner's] relationship with Helms had become frayed even before the Packer grievance, there is nothing to indicate that absent the discriminatory 14 September layoffs, [petitioner] would not have continued the balance of the Helms leases to term." It concluded that, in these circumstances, the General Counsel had established that petitioner canceled

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vehicles * * * and he would get rid of anybody that stood in his way.' " It found that petitioner "in fact exercised actual daily control over working conditions that affected where the drivers would go, whether they could take certain loads (upon which their remuneration depended), and, above all, whether they would be working or laid off." It added that petitioner had the "power to cancel their trucks' leases, a power that it proved was not in the least theoretical." Pet. App. 56a.

the remaining truck leases as a result of its prior unlawful actions, and that those cancellations violated Section 8(a)(3) and (1), absent a showing by petitioner that they were caused by "an independent intervening event." Pet. App. 79a-80a. The Board observed that petitioner had failed to "point to any independent intervening event which can be relied on to fix the date [it] would have terminated its relationship with Helms had the Packer grievance not provoked the first round of cancellations," and that there was record evidence that the Packer grievance had "influenced and * * * accelerated" the termination (*id.* at 80a). Accordingly, the Board rejected petitioner's contention that the cancellations effective September 30 would have taken place on the same date "even in the absence of the Packer grievance and the first round of unlawful layoffs triggered by it" (*id.* at 81a).

As a remedy, the Board directed that the drivers laid off on September 14 and subsequently offered positions with Team Transport should be made whole for any loss of pay or benefits for the period from September 14, 1981, to December 31, 1982, the date petitioner's agreement with Helms would have expired by its terms (Pet. App. 40a, 82a-83a), and that the drivers laid off on September 30 be similarly made whole. With respect to Packer, the only driver not offered a position with Team Transport, the Board directed that he be offered employment with petitioner or Team Transport and be made whole for any loss of benefits resulting from his layoff and denial of employment (*id.* at 40a, 77a n.3).[5]

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[5] The Board noted that in the compliance stage of the proceeding petitioner could introduce evidence establishing that "factors other than the Packer grievance" would have resulted in the termination of some or all of the drivers before December 31, 1982, and thereby mitigate its backpay liability (Pet. App. 83a n.10).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. 91a-95a). The court stated, in agreement with the Board, that the test of petitioner's status as a joint employer was whether petitioner, in fact, " 'possessed sufficient control over the work of the employees to qualify as a joint employer with the actual employer' " (*id.* at 93a). The court found ample support in the record for the Board's finding that petitioner was a joint employer, noting that petitioner "made the initial probationary hiring decisions, primarily controlled the drivers' day-to-day activities including acceptance of proffered loads, administered payroll, vacation and sick pay and at times accepted financial responsibility for union grievances brought against Helms" (*ibid.*).

The court further concluded that the Board's finding that the layoffs and cancellations were in retaliation for Packer's grievance was supported by substantial evidence (Pet. App. 94a). It also found that substantial evidence supported the Board's conclusion that the first round of layoffs was the "catalyst" for the second round. It agreed with the Board that "there were no independent, intervening events which might point to a non-discriminatory rationale for the further cancellations" (*ibid.*), and that, accordingly, those cancellations shared the discriminatory taint of the earlier cancellations, and also violated the Act.

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner acknowledges (Pet. 7) that in *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964), this Court established that the test of joint employer status is whether the alleged joint employer "possessed sufficient control

over the work of the employees to qualify as a joint employer with" the actual employer, and that the determination is "essentially a factual issue." Petitioner contends (Pet. 7-13) that the *Boire* v. *Greyhound* analysis was improperly applied here because, unlike the general contractor there, who had the power to control the employment relationship, it "was compelled to observe the policies dictated by Helms Express" (Pet. 9).

That argument simply takes issue with the Board's findings, upheld by the court of appeals, that, although its formal arrangement with Helms indicated that Helms alone was the drivers' employer, petitioner, in fact, "exercise[d] 'substantial * * * [control over] how the drivers performed their jobs" (Pet. App. 52a), " 'meaningfully affect[ed] significant matters relating to their employment,' " and exercised sufficient control to qualify as their joint employer (id. at 59a). Petitioner's fact-based contentions do not merit further review. *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 491 (1951); see *Beth Israel Hospital* v. *NLRB,* 437 U.S. 483, 507 (1978).[6] In any event, the Board's finding that petitioner required the drivers, on pain of discharge, to conform to its own standards and instructions, and to do so even when those instructions were contrary to Helms' interests and directives, are amply supported by the record.

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[6] Petitioner's assertion (Pet. 9) that "[t]he minimal discretion [it] exercised [] fell far short of that exercised in many cases where the Board and the courts have declined to find joint employer status" is simply an attack on the Board's finding that petitioner exercised actual daily control over the drivers' working conditions and required them to adhere to its own rules (Pet. App. 56a). None of the cases cited by petitioner (Pet. 9-10) conflicts with the Board's conclusion here if one accepts the Board's factual findings rather than petitioner's allegations. In *Laerco Transportation & Warehouse,* 269 N.L.R.B. 324, 326 (1984), the Board found that, while the alleged joint employer ex-

2. Petitioner no longer disputes that it discriminatorily canceled the leases of Packer and the 30 drivers junior to him, resulting in their layoffs on September 14. However,

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ercised "minimal" and "extremely routine" supervision over the disputed employees, all "major problems relating to the employment relationship [were] referred back to [their actual employer] for resolution." Similarly, in *United States Steel Corp.*, 270 N.L.R.B. 1318, 1319 (1984), the Board found that the alleged joint employer did not share in employee hiring or payroll distribution and did not establish employee work rules. While the facts in *Kaylor* v. *Crown Zellerbach, Inc.*, 643 F.2d 1362 (9th Cir. 1981), are analogous to the formal arrangements between Helms and petitioner, which on their face make Helms the sole employer (see Pet. App. 52a), there was no evidence in *Crown Zellerbach* that the alleged joint employer, in fact, exercised substantial independent control. In *Ace Doran Hauling & Rigging Co.* v. *NLRB*, 462 F.2d 190, 194 (6th Cir. 1972), the court held, in light of the "total factual context," that drivers of leased trucks were the employees of the lessor who had sole power to hire and fire the drivers, fixed their rates of pay and working conditions, withheld Social Security and income tax from their pay, and, on occasion, assigned them to perform work in its own independent operations. The very different total factual context here includes petitioner's insistence that its interests determined whether a driver could accept a load, even at the cost of loss of pay to the driver and disobedience to Helms' instructions (see Pet. App. 54a-57a).

Petitioner's reliance (Pet. 11-12) on *Howell and Van Schaak & Co.*, 95 N.L.R.B. 1028, 1029 (1951), for the proposition that its relationship to Helms was properly one of agent and principal again merely takes issue with the Board's finding that petitioner maintained actual control over important aspects of the employment relationship; the Board found no such control by the management agent in finding sole employer status of the building owners in *Howell*. *NLRB* v. *Schroeder*, 726 F.2d 967 (3d Cir. 1984), and *The Huntington Hospital, Inc.*, 229 N.L.R.B. 253, 255 (1977), are also inapposite; those cases dealt with the agency status of supervisory employees of an employer and raised no joint employer issue. *Teamsters & Auto Truck Drivers, Local No. 85*, 253 N.L.R.B. 632 (1980) (per curiam), is similarly inapposite, since it involved the separate test for single employer status (see *Radio Union* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965)), which has no application here.

petitioner contends (Pet. 21-28) that the Board erred in finding that the September 30 cancellations were unlawful. This contention also raises only an evidentiary issue that does not warrant review by this Court.

Petitioner asserts (Pet. 21-24) that the General Counsel never made out a prima facie case of a discriminatory motive for the September 30 lease cancellations and improperly shifted the burden of proof to petitioner to establish that those cancellations were not improperly motivated. However, the Board found on the evidence in the record, including testimony by petitioner's owner, that the second round of layoffs was *not* independent of the unlawfully motivated first round, but was "precipitated" by petitioner's prior unlawful actions (Pet. App. 79a-81a), and the court of appeals affirmed the Board's finding as supported by substantial evidence (*id.* at 94a-95a). The burden then properly shifted to petitioner to prove that it would have canceled the lease/agency arrangement when it did in the absence of Packer's grievance and other protected activity, which petitioner failed to do.[7]

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[7] Contrary to petitioner's contention (Pet. 21-22), the decision here is consistent with the Board's decision in *Wright Line, Inc., a Division of Wright Line,* 251 N.L.R.B. 1083 (1980), enforced on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), and with this Court's decision in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983). Under the *Wright Line* test for unlawful motivation, once the General Counsel shows that an employer's hostility to protected activity was a motivating factor in a discharge decision, a violation of the Act is established unless the employer proves, as an affirmative defense, that it would have taken the same action in the absence of protected activity.

The cases cited by petitioner (Pet. 24-26) are not inconsistent with the instant decision. In *NLRB* v. *Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961), the court of appeals, concluding that the Board's findings were not supported by substantial record evidence, found that the employer's decision to relocate had been made for lawful business

3. There is no merit to petitioner's additional contention (Pet. 13-21) that the Board improperly approved a settlement with Helms with the result that petitioner is primarily responsible for backpay until the cancellation of the lease arrangement with Helms on September 30, 1981, and solely liable for backpay from that date until December 31, 1982, the date the lease/agency arrangement would have expired had petitioner not canceled it.[8] Helms

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reasons and that its acceleration as a result of intervening union activity did not render the lawfully made relocation decision unlawful. In *NLRB* v. *Lassing*, 284 F.2d 781 (6th Cir. 1960), cert. denied, 366 U.S. 909 (1961), the court found that the employer had decided for sound business reasons to change its method of operations as soon as anything occurred that would increase its costs, and that implementation of the decision was not unlawful because the new economic factor was union activity that the employer reasonably believed would raise its operating costs. Similarly, in *NLRB* v. *Houston Chronicle Pub. Co.*, 211 F.2d 848, 852-853 (5th Cir. 1954), the court found that the employer's basic decision to switch to deliveries by independent contractors as soon as possible had been economically motivated, and that its employees' subsequent efforts to organize in an effort to prevent the change did not affect the lawfulness of the implementation. By contrast, in this case the Board found no credible evidence that, absent the unlawful motivation that produced the first round of layoffs, petitioner would have terminated the lease/agency arrangement, and the court of appeals agreed with the Board.

[8] Contrary to petitioner (Pet. 14), the decision below is not contrary to *NLRB* v. *United Food & Commercial Workers Union, Local 23*, No. 86-594 (Dec. 14, 1987). There the Court held that a prehearing informal settlement to which the charging party had not agreed was an exercise of the General Counsel's prosecutorial discretion and thus not subject to judicial review, while stating that a settlement following commencement of a hearing would be reviewable under the Board's rules. There is no issue presented as to the reviewability of the General Counsel's settlement with Helms. Petitioner's contention is that, in light of the settlement, it should not be held responsible, or primarily responsible, for affirmatively remedying the unfair labor practices found, and that contention was reviewed and rejected by both the Board and the court of appeals.

and petitioner, as joint employers, could have been jointly and severally liable for any unfair labor practices found in a proceeding in which both participated as respondents, but Helms avoided litigation and limited its liability by entering into a settlement agreement with the Board. Contrary to petitioner's assertion (Pet. 17-21), the Board is not precluded from proceeding against only one among several wrongdoers. Cf. *Radio Officers Union* v. *NLRB*, 347 U.S. 17, 52-55 (1954) (absence of joinder of employer for violation of Section 8(a)(3) of the Act does not preclude entry of backpay order against union for parallel violation of Section 8(b)(2)).[9]

Petitioner's further contention (Pet. 13-19) that, in the circumstances here, it was unfair for the Board to hold it primarily liable for the backpay award because Helms was the "true wrongdoer[]" (Pet. 14) is simply another attack on the Board's findings. The Board properly concluded, as the court of appeals held, that petitioner had caused the drivers' layoff in retaliation for the filing of Packer's grievance and that the record evidence, including evidence suggesting anti-union animus of Helms, established that

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[9] Contrary to petitioner (Pet. 17-18), *Ref-Chem Co.*, 169 N.L.R.B. 376 (1968), enforcement denied on other grounds, 418 F.2d 127 (5th Cir. 1969), and *Drapery Mfg.*, 166 N.L.R.B. 805 (1967), do not support the contention that the Board may not settle with one joint wrongdoer and proceed against another. In *Ref-Chem*, the Board held that a charge against one joint employer constituted a charge against another joint employer (169 N.L.R.B. at 380); it did not hold that the General Counsel could not accept a settlement from one joint employer. In *Drapery*, the Board simply held that, where two respondents were "a single, integrated employer who have jointly and severally violated [the Act] as established by the record," it was inappropriate for the administrative law judge to order affirmative remedial relief against only one respondent (166 N.L.R.B. at 805). Again, there was no settlement in *Drapery*.

petitioner and not Helms was responsible for the layoffs (Pet. App. 65a-68a).[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1988

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[10] The Board acknowledged that Helms' initial refusal to hire Packer created a suggestion of anti-union animus on its part (Pet. App. 66a), but rejected petitioner's contention that Helms, not it, was responsible for the layoffs because Helms could have employed the affected drivers on other trucks leased from fleet owner Robert Short and operating out of the Warrenburg terminal. The Board found that the number of trucks leased to Short was substantially less than the number of drivers affected by the cancellations, that Helms did not have sufficient confidence in Short to have him take over the Warrendale operation, and that petitioner's cancellation of the agency agreement led to "slack at the Emeryville terminal." *Id.* at 65a-68a.

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